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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/909,667	07/20/2001	Stephen D. Kuslich	S85.2-9892	1524
490	7590	06/09/2004	EXAMINER	
VIDAS, ARRETT & STEINKRAUS, P.A. 6109 BLUE CIRCLE DRIVE SUITE 2000 MINNETONKA, MN 55343-9185			PHILOGENE, PEDRO	
			ART UNIT	PAPER NUMBER
			3732	

DATE MAILED: 06/09/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/909,667

Applicant(s)

KUSLICH ET AL.

Examiner

Pedro Philogene

Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 29 April 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,3-13,15-20 and 25 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,3-13,15-20 and 25 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 4/29/04.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 3-13, 15-20, 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bao et al. (5,192,326) in view of Kuslich (5,549,679).

With respect to claim 1, 15, 17, 19, Bao et al disclose a method of treating a bone abnormality in a body comprising the following steps; exposing an area of bone having an abnormality; as best seen in FIGS.1-5, 14-18, the abnormality is selected from at least one member of the group consisting of: compression fracture of the spine and any combination thereof, forming at least one cavity in the bone, as best seen in FIG.13, wherein a portion of the at least one cavity defines an opening, inserting an expandable empty fabric bag (90) into the at least one cavity through the opening, the bag being formed of a fabric wall, the bag defining an interior and having an exterior; packing the bag through a fill opening with material that will support or promote bone growth through the fabric wall, the packing causing the bag to expand until the bag and material combination form a self-retaining rigid shape, wherein the exterior of the bag is substantially in contact with the bone of the cavity, the plurality of bag openings constructed and arranged to substantially prevent the material from passing from the

interior of the bag to the exterior of the bag; as set forth in columns 14-16, lines 1-67 and column 13, lines 27-67 respectively.

Although Bao et al teach of bag openings, it is noted that Bao et al., did not teach of bag openings between about 0.25 to 0.5 mm in diameter, as claimed by applicant. However, in similar art, Kuslich evidences the use of a bag having openings between about 0.25 to 0.5 mm in diameter to promote bone growth through the fabric wall.

Therefore, given the teaching of Kuslich, it would have been obvious to one having ordinary skill in the art the time the invention was made to incorporate openings between about 0.25 mm to about 0.5 mm in diameter in the bag of Bao et al. to promote bone growth through the fabric wall.

With respect to claims 3-13,16,18,20, the above combinations of references disclose all the method steps, as set forth.

Response to Arguments

Applicant's arguments with respect to claims 1,2-13,15-20,25 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

A shortened statutory period for reply to this action is set to expire THREE MONTHS from the mailing date of this action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Pedro Philogene whose telephone number is (703) 308-2252. The examiner can normally be reached on Monday to Friday 6:30 AM to 4:00 PM.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kevin P Shaver can be reached on (703) 308-2582. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Pedro Philogene
June 01, 2004


PEDRO PHILOGENE
PRIMARY EXAMINER